No. 75-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION,
Petitioner,

v.

CONSUMER FEDERATION OF AMERICA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Consumer Federation of America, American Public Gas Association, American Public Power Association and National League of Cities—United States Conference of Mayors, joint petitioners before the United States Court of Appeals for the District of Columbia Circuit, hereby file this brief in opposition to the petition of the Solicitor General on behalf of the Federal Power Commission ("FPC" or "Commission") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. For the purposes of this brief in opposition, we adopt the introductory sections of the petition for a writ except for the section entitled "Question Presented" which should be stated as follows:

Whether the Federal Power Commission has authority under the limited proviso of Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to exempt from normal certification requirements 180 day sales of natural gas to pipelines, when the prices of such sales from producer to pipeline will not be reviewed by the Commission at all and the inclusion of such prices in the pipeline's rates will be reviewed under a lesser and more uncertain standard than the "just and reasonable" requirement of Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c and d.

REASONS FOR DENYING THE WRIT

The Federal Power Commission in Order Nos. 491, 491-A, 491-B, and 491-C amended its regulations without a hearing to permit producers to make sales to pipelines for 180 days without the need to obtain a certificate, with no limit as to the price which the producers could exact from the pipelines and without any possible refund liability by producers for excessive rates received. The Commission purported to take this action under the limited exemption portion of the proviso to Section 7(c) of the Natural Gas Act, which Section provides:

> "*No natural-gas company* or person which will be a natural-gas company upon completion of any proposed construction or extension *shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission*, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, *unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity* issued by the Commission authorizing such acts or operations: . . . .
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> * * * *

> "In all other cases the *Commission shall set the matter for hearing* and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however, That the Commission* may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and *may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.*" [Emphasis supplied.]

The FPC's 180-day deregulation amendment expired by its own terms on March 15, 1974, the end of the winter heating season, and was not renewed during the following winter of 1974-75; however, because of the possibility that the producers which sold this gas could be required to refund to the pipelines and the consumers all amounts paid in excess of the just and reasonable area rate, the United States Court of Appeals for the District of Columbia Circuit found the question of this amendment's legality not to be moot, and held that the action taken by the Commission in the Order No. 491 series was unlawful and set these orders aside.

1. The Commission's allowance of 180 day noncertificated producer sales was unlawful for a number of reasons, the most important of which is that it constituted deregulation of producer sales to pipelines. The Commission specifically stated in Order No. 491-B that

> "Should we determine in a pipeline rate case that any emergency purchase was improvidently consummated at a rate which was more than necessary

> to secure the gas for the interstate market, *we will not require refunds by the producer.*" [App. E at 92a (emphasis supplied).[1]]

Thus, even if the Commission did determine after the fact that the price charged by the producer pursuant to the Order 491 procedure was excessive, it promised to take no action to obtain the return of the admittedly excess profits received by the producer.

The Commission's only regulatory function concerning the prices charged under these 180 day sales would be to review the price paid by the pipeline when the pipeline attempts to pass this cost on to the consumer in a pipeline rate case. But, as the court of appeals held, this proposed procedure of performing all regulatory actions at the pipeline level is contrary to the teaching of this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), and *Atlantic Refining Co.* v. *Public Service Comm'n (CATCO)*, 360 U.S. 378 (1959), that invocation of the FPC's authority to disallow "excessive" costs at the pipeline level is not an adequate justification for complete inaction at the level of producer prices. (*See* App. A at 23a.) This is so because a finding by the Commission that a pipeline may not pass through all purchased gas costs for these 180 day purchases is a finding that the sale by the producer to the pipeline was at an unjust and unreasonable rate. Yet, by specifically eliminating the possibility of producer refunds, the Commission is deliberately choosing to permit the producer to keep the windfall profits received by the sale to the pipeline at a rate above the just and reasonable level. This constitutes deregulation of producer rates and is unlawful under this Court's recent holding in *Federal Power Commission* v. *Texaco*, 417 U.S. 380, 401 (1974), that the Commission must

[1] References herein to appendices are to the appendices attached to petition of the FPC.

insure "that *the rates paid by pipelines*, and ultimately borne by the consumer, are just and reasonable." [Emphasis supplied.]

Thus, it is not enough that the FPC may not allow the pipeline to pass on to the consumer an unjust and unreasonable rate, but the Commission must also be certain the rates paid by the pipeline to the producer are just and reasonable, and this consideration has been specifically and explicitly eliminated by the Commission, contrary to this Court's mandate in *Texaco*, *supra* at 394, that:

> "Sections 4 and 5 of the Natural Gas Act require that all gas rates be just and reasonable; and the Court held in Phillips that this very prescription applies to the rates of all gas producers."

2. Compounding the unlawfulness of the Commission's attempt to satisfy the Natural Gas Act's requirement of producer regulation through the *post hoc* monitoring of pipeline charges of purchased gas costs to consumers, is the fact that the FPC's standard for reviewing the price of 180 day purchases is less than the "just and reasonable" requirement of Sections 4 and 5 of the Act. The stated purpose for the *de facto* deregulation of producer sales of 180 days duration was to attempt to attract supplies of gas to the interstate market which would otherwise be sold in the unregulated intrastate market in order to alleviate the deficiency in the supply of gas being placed on the interstate market during the 1973-74 winter heating season. (*See* App. C at 36a-38a.) [2] Order

[2] In light of this purpose, it should be noted that Order No. 491 applied to offshore gas in the Federal domain, as well as to onshore gas. Since offshore gas must be sold interstate, there was absolutely no justification for permitting 180 day producer sales at unregulated prices from the offshore area. The FPC has recognized this in its Order No. 533, issued August 28, 1975 in Docket No. RM75-25,

[Footnote continued]

No. 491 does not enumerate the standards which the FPC will utilize in determining if the price paid by the pipeline should be ultimately borne by the consumer and does not expressly mention the "just and reasonable" standard. The Commission utilized such expressions in Order No. 491-B as "will permit the pipeline to pass on to the consumer the rates of emergency purchases *only* when such rates can be shown to have been required by the public interest" (App. E at 91a; emphasis in original), and will not allow full recoupment by a pipeline of the price paid for purchases "improvidently consummated at a rate which was more than necessary to secure the gas for the interstate market" (App. E at 92a).

When these ambiguous statements are read together with the declared purpose of the 180 day sales, the only standard which is revealed to a pipeline considering whether to make a 180-day purchase is that if it is experiencing curtailment and a producer will not sell the gas to it at a lower price, then the price paid is "required by the public interest" and "necessary to secure the gas for the interstate market." This is not

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[2] [Continued]

wherein the Commission in issuing a statement of policy of questionable validity—one of the three sitting Commissioners declaring it patently unlawful—limited its action to onshore gas:

> "In proposing the policy statement we intended that it apply to the on-shore domain (whether federal or non-federal) and to the off-shore non-federal domain, *i.e.*, the only domain to which this statement of policy does not apply is the off-shore federal domain. We thought the reason for this restriction was apparent. One of the main goals of our statement of policy is to make gas otherwise sold only in the intrastate market available to the interstate market. The transportation or sale of gas from the off-shore federal domain is by definition transported or sold in interstate commerce. Since gas from the off-shore federal domain is therefore already available to the interstate market, we see no need for making the policy applicable to the off-shore federal domain." [Slip op. at 16.]

Consequently, Order No. 491 is also unlawful because its application is overly broad.

regulating rates at the just and reasonable level as required by Sections 4 and 5 of the Act because there is absolutely no account taken of the cost of the gas to guard against windfall profits, and the whole purpose of allowing a 180 day non-certificated sale is to *avoid* the just and reasonable ceiling established in the applicable area rate proceeding; this is simply allowing purchases at unregulated, whatever-the-market-will-bear prices.[3] Furthermore, the Commission, as the result of initiating regulation at the pipeline level after the payment of the unregulated rate by the pipeline to the producer, will naturally be more inclined to allow a pipeline to pass through the cost of 180 day gas since the pipeline has no recourse against the producer if the pass through to the consumer is not allowed.[4]

The present case is on all fours with the *Texaco* case, *supra*, in which this Court struck down a Commission attempt in Order No. 428 to deregulate small producer prices. In *Texaco*, the FPC determined that rates would no longer be directly regulated, but would be subjected only to indirect regulation through the review of purchased gas costs of pipelines and large producers to whom these small producers sell. 417 U.S. at 382-83. The small producers were permitted by the Commission to sell gas "at the price the market would bear even though in excess of maximum rates set for producers in pertinent area rate proceedings," and were exempted from any refund obligation. *Id.* at 384. It was claimed by the Commission in *Texaco*, as in the present case, that this action did not constitute deregulation of small producer sales because the FPC would continue to regulate these

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[3] The fact that the Commission has requested the producers and pipelines to submit certain evidence in rate proceedings held over a year after the 180 day provision terminated does not compensate for the lack of any standards for pipelines to follow *at the time* they were actually determining whether to make the purchases in question. (*See* FPC Petition at 13 n. 9.)

[4] The Commission has yet to disallow a single 180 day sale price paid by a pipeline.

sales through its regulation of pipeline and large producer rates, utilizing the standard of disallowance of that portion of the small producer price which was "unreasonably high." *Id.* at 384-85.

But this Court set aside the Commission's order in *Texaco* because, *inter alia*, it did "not expressly mention the just-and-reasonable standard" (*Id.* at 396), and the real yardstick to be used by the Commission in deciding whether to allow a pass through by a pipeline would be at best "reasonableness" in the unregulated marketplace:

> "It is true that pipeline and large producer costs for new small producer gas were not to be 'unreasonable' but the implication appears to be that reasonableness would be judged by the standard of the marketplace. It is also true that the Commission asserted that it was not deregulating small producer rates, that the Commission 'shall consider all relevant factors' in determining whether proposed rates were consistent with the 'public convenience and necessity,' and that the Commission intended to review new contract prices charged by small producers 'to assure that the reasonableness of the rates charged by such producers pursuant to the action we are taking herein.' But these generalities do not supply the requisite clarity to the order or convince us that it should be sustained." [*Id.* at 396-97.]
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> ". . . [W]e should also stress that in our view *the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act.*" [*Id.* at 397 (emphasis supplied).]

The Court noted that the reason why the unregulated market price is not the equivalent of the just and reasonable rate under the Act is because ". . . Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting

the market price for natural gas" (*Id.* at 397-98; footnote omitted). If the natural gas industry was anticompetitive when the Natural Gas Act was passed such that there existed no identity between the market price and the just and reasonable price, then certainly in a time of supply deficiency such as the present when the interstate market is at the mercy of the gas producers, there exists even greater reason to reject any possible correlation between the unregulated market price and the just and reasonable rate.

Thus, the Commission's Order No. 491 must fall, as the court of appeals held, not only because of unlawful deregulation of producers, but also because of the utilization of an unacceptably loose and ambiguous standard of rate regulation for pipelines.

3. In spite of all of the foregoing, the Commission wishes this Court to review the decision of the court of appeals below because it wants to have this Court conclude that the portion of the proviso to Section 7(c) of the Natural Gas Act which states that the Commission "may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest," permits this deregulation of producer rates for 180 day sales, which cover an entire winter heating season. The Commission specifically takes issue with the court of appeals' "narrow construction" (App. A at 19a) of this exemption provision, relying on this Court's statement in *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), that "the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." (*See* Commission Petition at 10.)

But the court of appeals' review of the legislative history of Section 7(c) reveals that the Commission has misplaced the emphasis on which portion of Section 7(c) is to be read broadly. The proviso to Section 7(c) con-

tains another clause which grants the Commission the authority to "issue a temporary certificate in cases of emergency." Both of these clauses of the one sentence proviso were passed together by Congress as a "slight amendment" to the remainder of Section 7(c) which was approved at the same time as part of the same bill and which extended the certification requirement to "all cases as a condition precedent to engaging in transportation or sale of natural gas subject to the jurisdiction of the Commission." (App. A at 14a.) [5] And the "temporary emergency" clause has been interpreted by the courts to apply only to "a narrow class of situations." (App. A at 13a.) [6] Furthermore, this Court has ordered refunds of excess amounts collected by producers under temporary, emergency certificates granted under the Section 7(c) proviso.[7]

Thus, the thrust and purpose of Section 7(c) is to include as many situations as possible within the FPC's certificate authority and to provide for a close scrutiny of all rates charged,[8] and the proviso was attached to the same bill to authorize temporary certificates in emergencies and to permit temporary acts on a small scale which are of such a nature that "the issuance of a certificate will not be required in the public interest." The court of appeals, therefore, correctly concluded that "§ 7 must be given a broad reading, and the exemption a narrow construction in light of the overall purpose of § 7 to provide a scrutiny needed in the public interest." (App.

[5] *See* H.R. Rep. No. 1290, 77th Cong., 1st Sess. (1941) at 2.

[6] Pennsylvania Gas and Water Co. v. FPC, 138 U.S. App. D.C. 298, 304, 427 F.2d 568, 574 (1970); *accord*, Algonquin Gas Transmission Co. v. FPC, 201 F.2d 334, 339-41 (1st Cir. 1953).

[7] Federal Power Commission v. Sunray DX Oil Co., 391 U.S. 9, 43-45 (1968); United Gas Improvement Co. v. Callery Properties, 382 U.S. 223, 229-30 (1965).

[8] Atlantic Refining Co. v. Public Service Comm'n, 360 U.S. 378 (1959).

A at 19a.) Since the express purpose of Order No. 491 was to elicit large volume sales to the interstate market, the exemption contained in the proviso to Section 7(c) will not serve to shield such sales from the Commission's statutory duty to regulate producer rates.

4. In the final analysis, the Commission's action in deregulating 180 day sales by producers is not only unlawful, but it also results in a situation which only perpetuates the shortage of gas supplies being placed on the interstate market by producers. In the first place, as noted in footnote 2, *supra*, since Order No. 491 applies to offshore gas in the Federal domain, which may only be sold interstate, as well as to onshore gas, it allows unregulated prices for gas which is not in competition with the intrastate market. Secondly, the allowance of unregulated rates for a six-month commitment of gas provides a great disincentive to long-term commitments of gas to the interstate market at regulated rates. This expectation of possible deregulation definitely makes a producer pause before making an indefinite commitment of its gas to interstate customers at just and reasonable rates. Furthermore, as noted above, since the just and reasonable rate for producers is set in appropriate area rate proceedings and since virtually all major interstate pipelines are experiencing curtailment, the only rationalization for allowing a price over the just and reasonable rate will be simply that there is a gas shortage. And this supplies quite an incentive for producers to perpetuate such a shortage.

5. The Commission begins its argument in support of its petition for certiorari by asserting that "[t]his case presents an important issue" concerning the FPC's authority to adopt emergency measures in a time of a gas supply deficiency. (Commission Petition at 8.) However, the "measure" in question, i.e., 180 day non-certificated, unregulated sales, although not moot because of the re-

maining question of producer refunds, certainly is not one which is of such importance that this Court should review it since, in addition to its patent illegality, it expired on March 15, 1974, and the Commission made no attempt to revive it during the winter heating season of 1974-75. In addition, as shown *supra*, the issues presented to this Court in this case have already been determined by this Court last year in its *Texaco* opinion.

What the Commission really seeks is an advisory opinion by this Court as to the limit of the measures the Commission may take to circumvent the requirements of the Natural Gas Act in order to achieve *de facto* deregulation of the interstate market. But the Court has already responded to this request as well in *Texaco*:

> ". . . the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted." [417 U.S. at 399.]

CONCLUSION

The petition for a writ of certiorari should be denied. Order Nos. 491, 491-A, 491-B, and 491-C permit the unlawful deregulation of the rates charged by producers for 180 day sales of gas, both offshore and onshore since producers are exempted from any possible refund liability; the standard utilized to review the inclusion of the rates paid by pipelines in the pipelines' own rates under this procedure falls far short of the just and reasonable requirement of Sections 4 and 5 of the Natural Gas Act; the legislative history and judicial precedent are clear that the proviso to Section 7(c) of the Act is much too narrow to encompass the deregulation of rates for all producer sales of up to 180 days duration; the issues presented are ones which this Court has previously reviewed and decided against the Commission in *Texaco*; and the 180 day procedure here involved was voluntarily terminated by the Commission even before the court of

appeals struck it down. In short, there is no compelling reason for this Court to review the eminently correct conclusion of the United States Court of Appeals for the District of Columbia Circuit that the 180 day procedure adopted in Federal Power Commission Order No. 491 is unlawful and must be set aside.

Respectfully submitted,

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